

No. 86-6

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

JAMES RICKETTS,
Petitioner,
v.
JOHN HARVEY ADAMSON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTION PRESENTED

Did Respondent John Harvey Adamson waive his right to be free from double jeopardy, by invoking his Fifth Amendment rights at a deposition, after the State threatened to prosecute him for interpreting a plea agreement which he reasonably believed he had fully satisfied?

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STATEMENT OF THE FACTS

Petitioner's "Statement of Facts" neither quotes nor cites the record. It contains such substantial omissions, distortions, and editorializations that we feel compelled to set out here, again, the facts on which the Court of Appeals actually ruled:

[John Harvey] Adamson was arrested and charged with the 1976 car bombing murder of Don Bolles, an investigative reporter in Arizona. In January 1977 Adamson and the state entered into a plea agreement under which Adamson would testify against two other individuals and plead guilty to second degree murder. In exchange, Adamson would receive a sentence of 48-49 years imprisonment, with actual incarceration time to be 20 years, 2 months.

On January 15, 1977, Superior Court Judge Ben Birdsall reviewed the plea agreement, but conditioned his acceptance of its provisions until he determined the appropriateness of the sentence. Four days later, Judge Birdsall found the sentence appropriate and accepted the guilty plea and plea agreement provisions.

After the court's acceptance of the plea agreement, for the next three years Adamson cooperated with authorities. On the basis of Adamson's testimony, Max Dunlap and James Robison were convicted of the first degree murder of Bolles. While the Dunlap and Robison convictions were pending on appeal, the state moved to have Adamson's sentence imposed. Judge Birdsall sentenced Adamson to the agreed term of 48-49 years on

December 7, 1978.[1]

On February 25, 1980, the Arizona Supreme Court reversed the convictions of Max Dunlap and James Robison and remanded the cases for new trials. State v. Dunlap, 125 Ariz. 104, 608 P.2d 41 (1980); State v. Robison, 125 Ariz. 107, 608 P.2d 44 (1980). When the state sought to secure Adamson's testimony in the retrials, Adamson's lawyer stated that his client believed that the plea agreement terminated his obligations once he was sentenced. He further stated that Adamson requested additional consideration, including release, in exchange for his testimony at the retrials. The state, in a letter to Adamson's attorneys dated April 9, 1980, stated that it considered Adamson to have breached the plea agreement by refusing to testify and that Adamson would be prosecuted for first degree murder.

A few days later, the state called Adamson as a witness at a pretrial hearing in the Dunlap and Robison retrials. Adamson reconfirmed his previous testimony concerning the Bolles killing but asserted a Fifth Amendment privilege when questioned about another crime. After examining the state's letter of April 9, 1980, Superior Court Judge Robert L. Myers denied the state's motion to compel Adamson to testify. Judge Myers concluded that Adamson could legitimately assert his Fifth Amendment rights unless the state granted him immunity from prosecution. Although the state sought review of Judge Myers' denial of the motion to compel Adamson to testify, the Arizona supreme Court declined to accept jurisdiction of the Special Action Petition. Adamson v. Superior Court, 125 Ariz. 579, 582, 611 P.2d 932, 935 (1980) (en banc).[2]

The state filed a new information charging Adamson with first degree murder, *id.*, which he challenged by a Special Action in the Arizona Supreme Court, *id.* at 579, 611 P.2d at 933. The court held that Adamson, by refusing to testify, breached the plea agreement and that he waived the defense of double jeopardy. *Id.* at 584, 611 P.2d at 937. The court vacated Adamson's second degree murder sentence, judgment of conviction,

1 Petitioner avoids mentioning that the plea agreement specifically provided that "the defendant will be sentenced at the conclusion of his testimony in all the cases" (789 F.2d at 732; App. A42), and that it was the State of Arizona that moved to have the sentence imposed, 789 F.2d at 724, 729-30. This was the factual premise of the Court of Appeals' critical conclusion that "[t]he obligation to testify could quite reasonably be interpreted to terminate at the time of sentencing." 789 F.2d at 729, App. A26. "Logic and common sense support Adamson's position that when the state moved for sentencing, it acknowledged his obligation to provide further testimony ended." *Ibid.*

2 Petitioner omits Judge Myers' ruling altogether. Again, the fact that he, as the presiding Arizona state trial judge at the deposition, specifically upheld the very assertion of rights by Mr. Adamson that the State later argued was an illegal breach of the plea agreement, was crucial to the Court of Appeals' decision holding Adamson's behavior reasonable. "The defendant, faced with the state's letter asserting he was no longer protected from prosecution, could hardly be expected to forego the constitutional protection against self-incrimination, especially when the Arizona Supreme Court refused to reverse Judge Myers' decision." 789 F.2d at 729, App. A28.

and guilty plea, and reinstated the open murder charge. Following that decision, Adamson offered to accept the state's interpretation of the agreement and to testify against Dunlap and Robison. The state refused Adamson's offer and proceeded with the charge of first degree murder.[3]

Adamson v. Ricketts, 789 F.2d 722, 724-25 (9th Cir. 1986)

(court's footnotes omitted).⁴

Petitioner's quarrel with the Court of Appeals turns wholly on these facts; yet he has not provided a single citation or reference suggesting that the Court of Appeals was wrong in any of these findings. Neither the District Court, nor the state courts before, made any findings to the contrary. Only by misrepresenting the record to this Court can Respondent suggest the Court of Appeals was wrong.

REASONS FOR DENYING THE WRIT

I. CERTIORARI IS INAPPROPRIATE HERE, BECAUSE THIS CASE TURNS EXCLUSIVELY ON ITS UNIQUE FACTS, AS TO WHICH THE COURT OF APPEALS' FINDINGS ARE IRREFUTABLY CORRECT.

The Petition in this case refers the Court to none of the considerations governing the exercise of the certiorari jurisdiction, Rule 17.1, because none of them support review here. A fair examination of the Court of Appeals' opinion shows it constitutes nothing more than the application of established

³ Again, Petitioner does not tell this Court that, as soon as there was any judicial determination that he was obligated to testify further, Mr. Adamson accepted that obligation and offered to resume his testimony. This fact, too, was a lynchpin of the Court of Appeals' decision.

When there was a reasonable dispute as to Adamson's obligation to testify, there could be no knowing or intentional waiver until his obligation to testify was announced by the Court. In this case, the Superior Court had upheld his refusal to testify and it was not until the Arizona Supreme Court ruling ... that it was judicially determined that he was obligated to testify. Immediately thereafter, Adamson agreed to do so. 789 F.2d at 729; App. A25.

⁴ The Court of Appeals' disposition of this issue rendered it unnecessary to reach a number of additional issues raised by the Petition. 789 F.2d at 725. Notable among these was the question of arbitrariness and vindictiveness in the prosecutors' actions in continuing to seek the death penalty against John Adamson (and permitting the other perpetrators of this crime to go free) when he has remained willing to testify according to the original terms of his agreement since it was first interpreted by the Arizona courts to require his further testimony. *Ibid.*

legal principles to indisputable facts. Nowhere did the Court of Appeals break new legal ground, and nowhere did it dispute or disregard any findings made in state court, or elsewhere.

A. The Court of Appeals' Decision Correctly Applied Established Legal Principles To The Unique Facts Of This Case.

In deciphering the unique posture of this case, the Court of Appeals majority extensively reviewed a detailed plea agreement, an exchange of letters, a number of state court hearings, and a lengthy habeas record. Applying accepted principles of law to the documents and proceedings involved, it found that double jeopardy protections barred the second murder conviction and death sentence imposed on Respondent John Harvey Adamson, after he had already been sentenced to prison for the exact same crime.

The Petition reveals that Petitioner's real disagreement is not with the legal basis of the Circuit's opinion, but its factual determinations.

The legal principles used by the Court of Appeals are hardly subject to dispute. First, double jeopardy prohibits multiple prosecutions for a single course of conduct. Brown v. Ohio, 432 U.S. 161, 168 (1977); Illinois v. Vitale, 447 U.S. 410, 419-421 (1980); 789 F.2d at 726; App. A15. Second, a waiver of double jeopardy rights must at least be a defendant's "voluntary choice". United States v. Scott, 437 U.S. 82, 100 (1978); see Menna v. New York, 423 U.S. 61 (1975).

All the Court of Appeals required the state to show here was some "action or inaction that Adamson knew would constitute a waiver." 789 F.2d at 728; App. A23. Every decision of this Court finding an exception from Double Jeopardy protection has required at least that.⁵ Petitioner does not attempt to argue to the contrary, but it has never identified such an action. Instead, it simply sprinkles its arguments with bald assertions-- unsupported by citation or evidence--that Adamson "deliberately"

⁵ See, e.g., Jeffers v. United States, 432 U.S. 137, 151-52 (1977); Sanabria v. United States, 437 U.S. 54, 63 n.15, 75-6 (1978); United States v. Dinitz, 424 U.S. 600, 606-09 (1976); United States v. Jorn, 400 U.S. 470, 484-86 (1971).

breached the plea agreement (Pet. 14, 21-22, 23-24), without ever specifying when this supposed "deliberate" breach occurred.

Petitioner attempted to avoid that specificity below. It was only in oral argument that the Court of Appeals finally pinned Petitioner's counsel down on this and he specified Adamson's invocation of his Fifth Amendment right at the Dunlap and Robison pretrial hearing, as the alleged breach of the plea agreement and the waiver of Double Jeopardy protections. See 789 F.2d 729; App. A26-7. But as the Court of Appeals noted,

Adamson's refusal to testify at the Dunlap and Robison pretrial hearings was in direct response to the State's letter purporting to withdraw the protections of the plea agreement. It was reasonable for him to believe that the State's position vitiated his obligation to testify. Furthermore, Judge Myers upheld the validity of his Fifth Amendment assertion, and the Arizona Supreme Court refused to hear the State's appeal.

Ibid., App. A27. The Court of Appeals understandably refused to accept the State's assertion that Adamson waived his constitutional rights by asserting them in the manner that was contemporaneously upheld by the presiding state trial judge.

All the Court of Appeals decided here is that, "even if the double jeopardy protection is waivable, it was not waived in this case." 789 F.2d 727, App A17-18. Its determination of this factually based question is unassailable.

B. The Court of Appeals Did Not Dispute Any Of The Factual Findings Of The Arizona Courts.

Nothing in the Court of Appeals' opinion infringes in any way upon the factual findings made by the Arizona State Courts. There never has been any real dispute over what the facts of this case are. Most of them are contained in documents, the contents of which are undisputed. The Court of Appeals' findings tracked these documents, and assumed the correctness of the state court's interpretation of the agreement as a matter of contract law. See 789 F.2d at 729. But it also recognized--as Petitioner does not--the distinction between the law of contracts and the Constitution:

The state argues, in effect, that Adamson entered into a contract, and that implied in that contract was a provision that if it was ultimately determined that Adamson breached the contract, even though he did so

unknowingly, the effect of the breach would be to waive his double jeopardy rights. Although unintentional breaches of contract can form the basis for damages in civil contract litigation, such principles are inappropriate to determine whether a defendant in a criminal action has knowingly and intentionally waived a constitutional right.

789 F.2d at 728-9, App. A23-24.

One searches its decision in vain to identify the "question of 'basic, primary, or historical fact,' Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963)", Strickland v. Washington, 466 U.S. 668, 698 (1982), on which Petitioner contends the Court of Appeals overruled the state court. The disagreement between the Court of Appeals and the state court lay in its assessment of the legal effect of the actions and statements of the parties involved. To the extent the Arizona Supreme Court addressed the double jeopardy waiver issue,⁶ its conclusion may have been inconsistent with the Court of Appeals'. But that hardly offends Section 2254(d). Issues of the loss or abandonment of federal constitutional rights are ultimately questions of federal law.⁷ The determination of whether a particular act or omission forfeits a federal right thus is not subject to the presumption of Section 2254(d). Miller v. Fenton, ___ U.S. ___, 88 L. Ed.2d 405 (1985); Brewer v. Williams, 430 U.S. 387, 397 n.4, 403-5 (1977). The Court of Appeals would have abrogated its duty, had it deferred to the Arizona state court's decision of that question. It properly did not; and its resolution of the issue is fully supported by the record.

⁶ The state court's only reference to the double jeopardy issue, in fact, does not appear to have resolved the question the Court of Appeals ultimately decided. The state court only addressed the Double Jeopardy objection the defendant had raised to the State's filing of a new information. Adamson v. Superior Court, 125 Ariz. 579, 611 P.2d 932, 933 (1980). It held that issue moot, in light of its decision that the filing of the new information was improper on separate grounds. Ibid. It thus seems doubtful that even if §2254(d) applied to it, the issue decided by the state court was the same issue on which the Court of Appeals' decision turned. Cf. Kimmelman v. Morrison, ___ U.S. ___, 91 L.Ed.2d 305, 328-9 (1986).

⁷ Murray v. Carrier, ___ U.S. ___, 91 L.Ed.2d 397, 414 (1986); Wainwright v. Sykes, 433 U.S. 72, 84 n.8 (1977); Lefkowitz v. Newsome, 420 U.S. 283, 290 n.6 (1975); North Carolina v. Alford, 400 U.S. 25 (1970); Brookhart v. Janis, 384 U.S. 1, 4 (1966); Fay v. Noia, 372 U.S. 391, 438-39 (1963); Townsend v. Sain, 372 U.S. 293, 309 n.8, 318 (1963); Parker v. Illinois, 333 U.S. 571 (1948).

CONCLUSION

This case involves no conflict among the lower courts, no important question of federal law which has not been, but should be, settled by this Court, and no inconsistency with this Court's decisions. Rule 17.1. The Court of Appeals correctly decided the Double Jeopardy question here, after carefully sorting through the unusual facts of this case. There is no ground here for this Court's intervention.

Respectfully submitted,

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September 8, 1986